IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 550

FREDDIE EUBANKS,

Petitioner,

vs.

STATE OF LOUISIANA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR THE PETITIONER

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CITATIONS

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Opinion Below

The opinion of the Supreme Court of Louisiana (R. 106-116) is reported at 232 La. 289, 94 So.2d 262.

Jurisdiction

The judgment of the Supreme Court of Louisiana was entered February 25, 1957 (R. 106). On April 1, 1957 the Louisiana Supreme Court refused a rehearing (R. 120). The petition for writ of certiorari was filed June 19, 1957, and was granted October 14, 1957 (R. 121).

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

Question Presented

Whether the total exclusion of Negroes from grand jury service in the Parish of Orleans continuously and consistently, without exception, for as long as any man remembers, including the grand jury that indicted petitioner herein, constituted such systematic exclusion of Negroes because of race and color as to deny defendant due process of law and equal protection of the law as guaranteed by the Constitution and statutes of the United States and by the Constitution of the State of Louisiana.

Statutes Involved

Fourteenth Amendment to the Constitution of the United States, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

18 Stat. 336, as amended, 18 U.S.C. 243:

> "No citizen possessing all other qualifications . . . shall be disqualified for service as grand or petit juror in any Court of the United States, or of any State on account of race, color, or previous condition of servitude; . . ."

Article 1, Section 2, Constitution of the State of Louisiana:

"No person shall be deprived of life, liberty, or property, except by due process of law. . . ."

Article 1, Section 9, Constitution of the State of Louisiana:

". . . no person shall be held to answer for capital crime unless on a presentment or indictment by a grand jury. . . ."

Louisiana Revised Statutes of 1950, Title 15, Section 172:

"The qualification to serve as a grand juror or petit juror in any of the courts of this state shall be as follows:

"To be a citizen of this state, not less than twenty-one years of age, a bona fide resident of the parish in and for which the court is holden, for one year next preceding such service, able to read and write the English language, not under interdiction or charged with any offense, or convicted at any time of any felony, provided that there shall be no distinction made on account of race, color or previous condition of servitude; and provided further, that the district judge shall have discretion to decide upon the competency of jurors in particular cases where from physical infirmity or from relationship, or other causes, the person may be, in the opinion of the judge, incompetent to sit upon the trial of any particular case.

"In addition to the foregoing qualifications, jurors shall be persons of well known good character and standing in the community."

Louisiana Revised Statutes of 1950, Title 15, Section 192:

"The jury commissioners for the Parish of Orleans shall qualify all persons before their selection as jurors, but the judges of the several district courts shall have the right to decide upon the competency of jurors."

Louisiana Revised Statutes of 1950, Title 15, Section 194:

"The said commissioners shall select at large, impartially, from the citizens of the Parish of Orleans having the qualifications requisite to register as voters, the names of not less than seven hundred and fifty persons competent under this Code to serve as jurors. A list of these names shall be prepared, certified to by the commissioners, and kept as part of the records of their office subject to the orders of the judges of the criminal district court of said parish. The names on said list shall be copied on slips prepared for the purpose, with the number and address corresponding to that on the lists and shall be placed in the jury wheel from which the drawing is to be made. . . ."

Louisiana Revised Statutes of 1950, Title 15, Section 196:

"Not earlier than the fifteenth and not later than the twentieth day of February of each year, and not earlier than the fifteenth and not later than the twentieth day of August of each year, the said commissioners shall draw from the said wheel the names of not less than seventy-five persons, which said names, upon a day next following said drawing, not a Sunday or a legal holiday or a legal half-holiday, shall be submitted by said commissioners to the presiding judge of that section of the criminal district court whose turn it shall happen then to be, to impanel the incoming

grand jury; and said judge, from the names thus submitted, shall select twelve persons who shall constitute the grand jury for the Parish of Orleans for the grand jury term next ensuing. Each judge of the criminal district court shall, in rotation, select the grand jury for the Parish of Orleans. . . ."

Louisiana Revised Statutes of 1950, Title 15, Section 459:

"Whenever, during the trial of any criminal case, either party may desire to offer in evidence any record, paper or document belonging to the files or records of the court in which the trial is proceeding, the presiding judge shall, at the request of such party, direct the clerk to produce such record, document or paper, in order that the same may be used in evidence; and it shall not be necessary for the clerk in any such case to make a copy of such record, document or paper."

Statement of the Case

On June 8, 1954, the petitioner, Freddie Eubanks, a youthful colored male whose exact age has never been established, was indicted by the Orleans Parish Grand Jury for the crime of murder of an aged white female by the name of Mrs. Mabel E. Gordy Clarkson on or about the 24th day of May, 1954 (R. 1).

Through counsel, on August 22, 1954, the petitioner filed a motion to quash the indictment for the reason that petitioner was deprived of due process of law and equal protection of law as guaranteed by the Constitution of the United States and by the Constitution of the State of Louisiana by virtue of the systematic exclusion of Negroes from the grand jury which indicted him, as well as from

preceding grand juries in Orleans Parish (R. 22, 23). Thereafter on September 17, 1954 and January 4, 1955, testimony was adduced on the motion to quash the indictment and stipulations entered into between the State of Louisiana and the petitioner bearing upon the said motion (R. 50-105).

On January 7, 1955, the petitioner filed a Supplemental Motion to Quash the indictment on the same grounds of unconstitutional exclusion of Negroes from the grand jury, and on January 12, 1955, the Court denied the motions to quash, and a bill of exception was timely reserved (R. 24-32).

On July 1, 1955, the Petit Jury returned a verdict of guilty as charged against petitioner (R. 20).

On February 24, 1956, the petitioner filed a motion for a new trial and a motion in arrest of judgment, which were denied (R. 39-45). Petitioner filed formal bills of exception, including those based upon the motions to quash and the adverse rulings on the evidence during the hearings on the said motions (R. 27-38; 45-48).

On May 2, 1956, the petitioner was sentenced to death by electrocution (R. 48). On the same date, petitioner moved for a suspensive appeal to the Supreme Court of Louisiana, which was granted (R. 49). Thereafter argument in behalf of petitioner was presented to the Louisiana Supreme Court based, *inter alia*, upon the constitutional questions raised in the said motions to quash the indictment, and on February 25, 1957, the conviction and sentence were affirmed by the Supreme Court (R. 106-116).

Application for rehearing was timely presented to the Louisiana Supreme Court (R. 117-119), and refused on April 1, 1957 (R. 120).

On June 19, 1957, petitioner filed a writ of certiorari and motion to proceed in forma pauperis in the United States Supreme Court.

On October 14, 1957, the Supreme Court of the United States granted petitioner's writ of certiorari and motion to proceed in forma pauperis (R. 121).

Summary of Argument

Petitioner is a Negro who was indicted, convicted and sentenced to death in Orleans Parish, State of Louisiana, for the murder of a white woman.

The all-white grand jury which indicted petitioner was chosen from the Parish of Orleans where approximately 32% of the population are Negro. There is a high percentage of the Negro race qualified for grand jury service by reason of their education, and business and professional training and achievement. A large percentage of Negroes are registered to vote, and Negroes have served on grand juries in the Federal courts of New Orleans for over fifty years.

Yet, there has never been a Negro selected to serve as a grand juror in the state courts in the history of Orleans Parish in the memory of any living person, except one Negro who possessed the characteristics of a white man and who was chosen by a judge under the mistaken belief that he was white.

Such total exclusion of a class of people from grand jury service where there are large numbers of their class available and qualified to serve constitutes a *prima facie* case of deliberate, systematic and purposeful discrimination against that class of persons contrary to the Fourteenth Amendment to the Constitution of the United States

which guarantees equal protection of the laws to all citizens of the separate states.

The Supreme Court of the United States has declared that equal protection of the laws requires that a colored person shall be afforded the opportunity to have members of his race serve on the grand jury in cases involving his life or liberty and, therefore, any denial of this guarantee, either by a law which does not provide a fair mode of selection or by officers who systematically administer a valid law so as to accomplish gross inequalities, cannot be countenanced.

Where such complete exclusion of the Negro has been accomplished, as in Orleans Parish, the burden of rebutting the *prima facie* case of systematic exclusion rests with the state, and it cannot discharge that burden by mere general assertions of public officials that they have not discriminated.

The complaint in this case is not against the statute which is believed to be constitutional, but against those public officials who have administered under that statute so as to effectively proscribe the Negro race in Orleans Parish from grand jury service.

ARGUMENT

The Conviction of a Negro Upon an Indictment Returned by the Grand Jury of a Parish in Which, at the Time of Such Return and Long Prior Thereto, Negroes Were Intentionally and Systematically Excluded From Grand Jury Service, Solely on Account of Their Race and Color, Denies to Him the Equal Protection of the Laws, in Violation of the 14th Amendment of the Federal Constitution.

Petitioner is a Negro who was indicted for the murder of a white female. He pleads that the indictment be quashed because of the systematic and intentional exclusion of Negroes from grand juries in Orleans Parish, including the grand jury which returned the indictment against him.

The Supreme Court of the United States has established by a long succession of opinions a criterion by which it determines whether there has been systematic and purposeful exclusion of Negroes from grand juries because of race and color. By applying that criterion to the facts herein, it irresistibly follows that the indictment returned against petitioner should have been quashed as being repugnant to the Constitution of the United States.

From the testimony of a vast number of witnesses called by the petitioner, including five of the six judges of the Criminal District Court for the Parish of Orleans, the senior of whom began serving in 1921 (R. 82-85; 88-101), the district attorneys for the Parish of Orleans from 1927 through 1954 (R. 85), the Clerk of the Criminal District Court since 1920 (R. 101), jury commissioners for the Parish of Orleans from 1928 through 1954 (R. 50-58; 69-77), the Registrar of Voters of the Parish of Orleans since

1952 (R. 59-61), Assistant Superintendent of Public Schools since 1944 (R. 62-69), Clerk of the United States District Court for the Eastern District of Louisiana and ex-officio Jury Commissioner since 1939 (R. 79-81), and from the stipulations entered into between the State and petitioner, as well as the exhibits filed (R. 81, 87; 103-105), the following unalterable conclusion must be drawn, to-wit:

That notwithstanding a substantial Negro population in New Orleans since the turn of the century, including literate, schooled, intelligent and qualified Negroes eligible for grand jury service, and including six qualified Negroes on the venire submitted to Judge Frank T. Echezabal for selection of the grand jury that indicted petitioner, that no known Negro was ever called for grand jury service in the history of Orleans Parish, to the memory of any living person.

It was established by the testimony of Ernest O. Becker, Assistant Superintendent of Public Schools for Orleans Parish for ten years preceding his testimony that there has been a system of compulsory education for Negroes in Orleans Parish for over thirty years, and that Negro children have been required to attend school through their sixteenth year (R. 63). For the session 1953-1954, there were 51 white grade public schools with an enrollment of 26,900 and 32 Negro grade public schools with an enrollment of 26,129 (R. 63, 64). During the same period there were 860 white teachers compared with 677 Negro teachers in said elementary schools (R. 64). White secondary public schools numbered 18 with 12,422 students and 550 teachers while Negro secondary public schools numbered 9 with 7,243 students and 301 teachers (R. 64). At the university level, the witness testified that during the same period, Negroes were attending Loyola University, and two Negro universities of over one thousand enrollment (R. 65).

Registration of Negroes in public elementary and secondary schools for the period 1923-1954 was also shown to be substantial (R. 103-105).

The testimony of Mack A. Dyer, Registrar of Voters since 1952 was to the effect that the majority of registrants could completely fill out and sign their application cards and that very few required assistance (R. 60). In connection with his testimony a record of colored and white registration, 1951-1954, was filed showing a substantial number of Negroes registered to vote (R. 103).

Mr. A. Dallam O'Brien, Clerk of the United States District Court for the Eastern District of Louisiana, and ex-officio Jury Commissioner, established that for a number of years prior to the date of his testimony at least two Negroes per year from Orleans Parish served on the Federal grand jury (R. 79-81).

It was also established by stipulation in order to conserve many days of hearing, that the petitioner could produce as witnesses at said hearing, 100 Negro residents of Orleans Parish, qualified as grand jurors, who were professional or business people, and who have never served as grand jurors (R. 87).

From the cumulative testimony of the Jury Commissioners for the Parish of Orleans from 1928 through 1954, it is well established that there has been a conscientious and consistent attempt to place the names of qualified Negroes in the wheel of prospective jurors in Orleans Parish (R. 50-58; 69-78). Mr. William P. Dillon, who served from 1928 to 1940, testified there were qualified Negroes in the wheel each year in which he served (R. 52), and that there were Negroes among the 75 submitted to the judges on practically each occasion of the selection of the grand jury, as he appeared in court on those occa-

sions and observed the Negroes in attendance (R. 53). Since two grand juries are selected each year, and Mr. Dillon served for twelve years, there would have been Negroes on practically each panel on twenty-four occasions. Mr. Walter E. Douglas, who served as Jury Commissioner from 1942 to 1948 and from 1952 to date of hearing, also testified that qualified Negroes were in the jury wheel each year in which he served (R. 69). Mr. Dudley Desmare served as Jury Commissioner from 1948 to 1952 and testified identically as the other gentlemen with regard to the presence of qualified Negroes in the jury wheel during his tenure of office (R. 76).

The procedure for drawing and impaneling grand juries in the Parish of Orleans is set out in the Revised Statutes of Louisiana of 1950, Title 15, Section 196 (Louisiana Code of Criminal Procedure). This section provides that twice annually the jury commissioners shall draw from the jury wheel the names of not less than seventy-five persons, which said names shall be submitted to the presiding judge of the Criminal District Court whose turn it shall happen then to be, to impanel the incoming grand jury. The judge selects twelve persons from the seventy-five names submitted.

There were six Negroes on the panel of seventy-five which was submitted to Judge Frank T. Echezabal who selected twelve white men to serve as his grand jury and which grand jury indicted petitioner (R. 78, 87).

While the minutes of Judge Echezabal's Court do not reflect how he selected the grand jury which indicted petitioner (R. 6, 7, 94), Judge Echezabal testified that he selected this grand jury in the same manner that he selected all of his grand juries since he ascended to the bench in October, 1921 (R. 92). Substantially, Judge Echezabal's method of selection was as follows: he did not interview

any of the members of his panel, but on the basis of his lifetime residence in New Orleans for a period of 77 years he was admittedly familiar with a large number of the names on the panel, and additionally he had the benefit of the street addresses, occupations, telephone numbers and the history of their service as petit and grand jurors. Judge Echezabal was familiar with the streets and neighborhoods in the City of New Orleans and it is submitted that he could tell at once from his list who were citizens of prominence in the community, who were from modest or poor neighborhoods and who were from colored neighborhoods. The knowledge of both the neighborhood and the occupation served to inform the Judge of the vital data he was seeking in the selection of his grand juries. As Judge Echezabal said, he was looking for the qualities of good character, citizenship, availability and education in his prospective jurors (R. 93). He was sure to find these qualities among the names of those jurors he knew personally or by reputation in addition to those whose records disclosed they were men from substantial neighborhoods who enjoyed high positions and occupations. In all events, Judge Echezabal never selected a single Negro in all of his years on the bench (R. 91).

Each of Judge Echezabal's colleagues of the Criminal District Court for the Parish of Orleans was called to testify with reference to his method of selecting his grand juries.

Judge Niels P. Hertz, presiding judge at the trial of petitioner, declined to testify (R. 101, 102).

Judge William J. O'Hara testified that he has been a member of the Court since May, 1932; that while he has in each instance attempted to interview all members of his panel before selecting his grand jury, that he never selected a Negro, although there was an average of between 6 and 10

qualified Negroes on each of his panels from 1936 and continuously thereafter. Judge O'Hara testified that in the case of *State of Louisiana* v. *Alfred Dowels*, No. 139-324 of the docket of the Criminal District Court for the Parish of Orleans, he sustained the motion of the defendant and quashed the indictment in a case arising out of the same type of attack on the grand jury selected by one of the other judges of the said Criminal District Court. Judge O'Hara's reasons for judgment in sustaining the motion to quash were very revealing as to practices in the past and counsel offered them in evidence, but their admission was disallowed by the trial Court, to which a bill of exception was timely filed (R. 94-98, 102, 37, 38).[1]

Judge George P. Platt testified that he had been a judge of the same court since 1936; that he knew Negroes were

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[1] In the opinion of the Louisiana Supreme Court, the trial judge correctly disallowed the introduction of the reasons for judgment in a different though similar case, on the authority of *State of Louisiana* v. *Green*, 221 La. 713, 722; 60 So.2d 208, 210 (R. 110). The Louisiana Supreme Court erred in citing the *Green* case as authority for this proposition, however, because in the *Green* case, the defendant was indicted by a grand jury which was selected by a new method of jury selection adapted by the jury commission of Concordia Parish, after the decision of the Supreme Court of the United States in *Cassell* v. *Texas*, 339 U.S. 282, which made it unnecessary to inquire into the practices of the past. In the instant case, however, it is not only material but essential that the court consider past practices of jury selection in Orleans Parish, because there is no showing whatever to differentiate the selection of the grand jury that returned the indictment against petitioner from the continuous succession of grand juries in the past from whose rosters Negroes were consistently omitted.

In following the law of the State of Louisiana, in Louisiana Revised Statutes of 1950, Title 15, Section 459, the clerk of the Criminal District Court was not required to make a copy of the record of *State of Louisiana* v. *Dowels* in order for it to be considered as evidence in the case, and it was omitted from the transcript of record herein, but, in order to have the record before the Supreme Court of the United States, petitioner has lodged a certified copy of the same with the Clerk of the United States Supreme Court.

on his panels; that he interviewed each of the prospective jurors and that he never selected a Negro to serve on any of his grand juries (R. 88-90).

Judge Fred W. Oser testified that his term of office as judge of the Criminal District Court began in 1936; that he habitually sent letters to approximately 30 or 35 of the 75 names for interviews or telephoned those he knew personally; that he did not recall whether he interviewed a Negro at any time although he felt that he had, but that he never selected a Negro on any of his grand juries (R. 82-85).

Judge J. Bernard Cocke served as judge of the same court since 1944. He testified that of the 75 names submitted to him that invariably he knew approximately 20 personally or by reputation and that the data submitted with the names served as an aid in determining the type of person on the panel; that he would invite the 20 to his chambers for an interview and select his grand jury of twelve from that number; that he never invited or selected a Negro to serve on his grand juries (R. 98-101).

Not a person called to testify, including the said five judges nor the jury commissioners nor the district attorneys nor the clerk of court could recall a single Negro being called to serve as a member of any grand jury except one by the name of Walker, who possessed the physical characteristics of a member of the Caucasian race, and who was selected in the belief that he was a white man and not a Negro (R. 90, 99, 100). As some of the witnesses called were men in their seventies such as Judge Echezabal and Jury Commissioner Dillon, and two had served in the Criminal District Court for nearly 35 years (Judge Echezabal in that capacity since 1921 and Clerk Haggerty since 1920, R. 101), and all were associated in some official capacity with the Criminal District Court and possessed

particular knowledge of the selection and composition of the Orleans Parish grand juries, it must be concluded that no known Negro ever served on any grand jury in the history of the Parish of Orleans in the memory of any living person.

The fact that there have been a large number of Negroes in Orleans Parish and that there have been many qualified among them who have served in professional and executive capacities, who have been qualified by their education, who have been qualified to vote, who have been considered by the jury commissioners to be qualified to serve as grand jurors and who have been legally qualified to serve on the Federal grand jury in New Orleans, establishes a *prima facie* case of discrimination against Negroes in the selection of grand jurors in Orleans Parish. As Judge William J. O'Hara of the Criminal District Court said in quashing the indictment of a previous grand jury,

> "The fact that there are male Negroes in New Orleans legally qualified to serve on the Federal Grand Jury and who have been continuously serving over the years on the Federal Grand Jury in New Orleans establishes the fact that there are Negroes in the community with the legal qualifications to serve on the State Grand Jury in Orleans."

State of Louisiana v. *Dowels*, 139-324, Criminal District Court for the Parish of Orleans, unpublished.

The conclusion is undeniable that there has been systematic, intentional, unlawful and unconstitutional exclusion of Negroes from the grand juries in the Parish of Orleans continuously and uninterruptedly for as far back as man remembers, solely and only because of their race and color, and that the systematic, intentional, unlawful and unconstitutional exclusion has extended to the present

grand jury which indicted the defendant herein, contrary to the Fourteenth Amendment to the Constitution of the United States, as well as to the Constitution of Louisiana of 1921, Article 1, Section 2, which adopted in part the language of the Fourteenth Amendment to the Federal Constitution.

The sacred principles of the Fourteenth Amendment of the Federal Constitution, including the due process, equal protection and privileges or immunities clauses contained therein have been violated by the State of Louisiana which has countenanced the unlawful grand jury selection methods in the Parish of Orleans.

The Act of Congress pursuant to those constitutional guarantees is 18 Stat. 336, as amended, 18 U.S.C., Section 243, to-wit:

> "No citizen possessing all other qualifications . . . . shall be disqualified for service as grand or petit juror in any Court of the United States, or of any State, on account of race, color, or previous condition of servitude; . . ."

The question of unlawful discrimination in the selection of grand juries is not novel to the jurisprudence of Louisiana or of the United States. Cases are legion in which the United States Supreme Court has declared that convictions of Negroes for slaying or raping of whites cannot be countenanced when, in obtaining the conviction, the Constitution has been violated. The Supreme Court of Louisiana has followed this principle in cases in which discrimination was shown. *State of Louisiana* v. *Anderson*, 205 La. 710, 729; 18 So.2d 33, 40; *State of Louisiana* v. *Nichols*, 216 La. 622, 633; 44 So.2d 318, 321.

Therefore the decree of the Louisiana Supreme Court in the Eubanks case is erroneous, as it is in conflict with

prior decisions of the Supreme Court of Louisiana, as well as decisions of the United States Supreme Court.

One of the most famous cases dealing with the subject of Negro discrimination in the selection of the grand jury, which was decided by the United States Supreme Court, was the case of *Norris* v. *Alabama*, 294 U.S. 587, often referred to as one of the "Scottsboro Boys" cases. Mr. Chief Justice Hughes, in delivering the opinion of the Court (at p. 589), cited the case of *Carter* v. *Texas*, 177 U.S. 442, 447, wherein the fundamental concept of systematic exclusion was set forth, as follows:

> "Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. *Strauder* v. *West Virginia*, 100 U.S. 303; *Neal* v. *Delaware*, 103 U.S. 370, 397; *Gibson* v. *Mississippi*, 162 U.S. 565. This statement was repeated in the same terms in *Rogers* v. *Alabama*, 192 U.S. 226, 231, and again in *Martin* v. *Texas*, 200 U.S. 316, 319. And although the state statute affirming the qualifications of jurors may be fair on its face, the constitutional provision affords protection against action of the state through its administrative officers in effecting the prohibited discrimination . . ."

In the *Norris* case, the Supreme Court found that no Negro had served on any grand jury in that county within the memory of witnesses who had lived there all of their lives, and that in view of there being qualified Negroes in

the county this testimony alone made out a *prima facie* case of the denial of equal protection which the Constitution guarantees. Nor was the *prima facie* case overthrown by the fact that the Alabama statutes fixed a high standard of qualifications for jurors and that the jury commission was vested with a wide discretion.

This decision is particularly applicable to the Orleans Parish situation wherein the same critical facts prevail, i.e., the large number of qualified Negroes available, the total exclusion of Negroes from the grand jury for as long as witnesses remember, and the wide discretion which the court has exercised in selecting jurors. But, notwithstanding the fact that the judges are vested with wide discretion, the *Norris* case demands that that discretion be exercised within the bounds of the Fourteenth Amendment.

Within three years after the *Norris* decision, our Louisiana Supreme Court decided the case of *State of Louisiana* v. *Pierre*, 189 La. 764, 774; 180 So. 630, 633, arising from a capital conviction in St. John Parish. The State Supreme Court (at p. 774), chose to distinguish the case from the *Norris* case by showing that there were few qualified Negroes in this small parish, and denied the defendant's plea. However, the case went to the United States Supreme Court on certiorari, *Pierre* v. *Louisiana*, 306 U.S. 354, 361, and the case was remanded upon a finding of systematic and unconstitutional discrimination in accordance with the rule of *Norris* v. *Alabama*, and other cases cited. Pierre was tried and convicted a second time on an indictment by a grand jury after the discriminatory procedures were corrected in accordance with the mandate of the United States Supreme Court handed down in the first *Pierre* case. *State of Louisiana* v. *Pierre*, 198 La. 619, 627; 3 So.2d 895, 897.

State of Louisiana v. *Nichols, supra,* 216 La. 622, 633; 44 So.2d 318, 321, is another Louisiana case which recognized the mandate of the United States Supreme Court, in denouncing racial discrimination in the selection of grand juries. The Louisiana Supreme Court recognized the existence of the same facts that prevailed in *Pierre* v. *Louisiana, supra,* 306 U.S. 354, 361, and held:

> ". . . we are duty bound to arrive at the same decision as announced by the United States Supreme Court in its findings in the first Pierre case supra. There we find both precedent and authority. We have no doubt that the jury selected in the instant case gave to the accused a fair trial and that the State officials were in good faith and well-intending, but our United States Supreme Court is a judicial planet whose orbit draws into its vortex the findings of all State courts involving all federal constitutional questions which must be obeyed in order to maintain the law in its majesty of final decision."

In view of the *Nichols* and *Pierre* decisions, it can hardly be said that the Louisiana Supreme Court is not aware of the ruling law of the United States Supreme Court, and when we consider that the same judge authored the *Nichols* case and the instant case, it becomes difficult to understand the rationale of the State Supreme Court and to reconcile its two divergent views.

The Court in the instant case accepted the evidence that the Negro population in the Parish of Orleans is approximately 30% and that the names of Negroes have been in the general wheel at all times (R. 109). The Court also recognized the pattern of proof established in *Norris* v. *Alabama, supra,* 294 U.S. 587, 598, to the effect that the United States Supreme Court "could not accept the mere

statement of officials as to the performance of their duties but must actually examine the records to determine whether there had been a deliberate exclusion of Negroes from jury service" (R. 108). Yet, the court did what it knew was prohibited by the United States Supreme Court and accepted the statement of Judge Echezabal that he did not exclude Negroes from his grand jury on account of race, without examining the record. Judge Echezabal did not interview a single Negro in selecting the grand jury that indicted petitioner to determine whether they were or were not qualified or as qualified as the white men he selected. And in all of his 33 years on the bench he never interviewed a Negro and had never placed a single Negro on any of his grand juries. By these facts alone, how could he have afforded the equal protection of the laws to the Negro race? The State Supreme Court cannot justify its conclusion that the judge "thought that the white persons selected were better qualified" (R. 108), when the judge admittedly did not compare qualifications of the two races or even know, according to his testimony, that there were Negroes on his panel (R. 93). It would be fairer to say that the judge selected twelve men he knew to be well qualified and white (R. 93). This had always been Judge Echezabal's method of selection (R. 91), and this method has always served to exclude Negroes from his grand juries. The reason is obvious. Judge Echezabal has always sought to select men he knew personally or by their exemplary reputation in the community. Such a method of selection by a distinguished judge who is well acquainted with many of the leaders of the community would necessarily result in the exclusion of Negroes from his grand juries because Negroes in New Orleans, as a class, have not been able to compete with the white in prominence and in social and economic accomplishment. Such a deliberate method of *inclusion* in always selecting those men known

to the judge personally or the most prominent within his knowledge, necessarily involves the corollary of deliberate *exclusion* of those not known to him or as well situated in the community, and therefore the method must be condemned as not affording equal protection of the laws to a class of people. While the judge is given wide discretion to select grand jurors in Orleans Parish, by this method employed, no Negro not personally known to Judge Echezabal or distinguished by his prominence would ever have the opportunity of serving on the grand jury. As Judge William J. O'Hara observed in his reasons for granting a motion to quash an indictment under the same facts in *State of Louisiana* v. *Dowels*, No. 139-324 of the docket of the Criminal District Court for the Parish of Orleans:

> "There can be no doubt that while the judges have a discretion in the selection of twelve grand jurors from seventy-five veniremen that that discretion is bound on all sides by the Fourteenth Amendment and must be exercised within its limits and limitations . . . that any means or standard of selection that continuously eliminates the colored person violates the Fourteenth Amendment and must be revised to admit Negroes to comply with said amendment."

It is common knowledge that all of the judges in New Orleans have practiced a traditional method of selecting grand jurors. Their own testimony is corroborative of this knowledge. While some have interviewed the prospective jurors and others have not, the result has been the same. The traditional practice has been to select the grand jury on the basis of civic prominence and reputation. Since there have been an average of between 6 and 10 Negroes to between 65 and 69 white persons on the venire (R. 96), those judges who even went to the extreme to

interview all of the veniremen and then compare their qualifications on the above criteria, found that the Negro could not successfully compete with the white for a place on the grand jury, considering the social and economic discrepancy between the two races in New Orleans. Therefore, under the system of selection employed by *all* of the judges, whether they selected the jurors after interviewing them or whether they selected them directly from the list submitted by the jury commissioners, as in the case of Judge Echezabal, it is obvious that no Negro ever had an opportunity to serve on the grand jury, which accounts for the total exclusion of Negroes from all grand juries in the history of the Parish.

This deprivation of the *opportunity* to serve on the grand jury is the violation of the law. Petitioner does not charge that there should have been one or more Negroes on the grand jury that indicted him or that there should have been a fixed percentage or number of Negroes on any particular previous grand jury in Orleans Parish, but that where there has been none of his race serving on any grand jury in the history of the Parish, where there exist large numbers of qualified Negroes available for grand jury service, the conclusion is inevitable that the method of selection by the judges must be designed to deprive his race of the *opportunity* to serve in that capacity.

Therefore, the opinion in the case of *State of Louisiana v. Dorsey*, 207 La. 928, 954; 22 So.2d 273, 281, which is relied upon by the respondent, would not be countenanced by the United States Supreme Court.

In comparing the opinion of the Louisiana Supreme Court (R. 108) with the testimony of Judge Echezabal (R. 93) we are faced with an irreconcilable conflict. Judge Echezabal said that he interviewed neither white nor colored before selecting his grand jury and that he did not know

whether there was or was not a single Negro on his venire. However, the opinion of the Louisiana Supreme Court was, as follows:

> "The record discloses no systematic exclusion of Negroes from the Grand Jury. The only reason Negroes were not selected to serve was that the Judge selecting the Grand Jury thought that the white persons selected were better qualified."

In the final analysis, whichever view is taken, the law has nevertheless been violated. If we accept the view that Judge Echezabal selected his jury without knowing whether Negroes were or were not in the venire, then we must conclude that he did not even consider selecting Negroes. Certainly, he cannot escape his duty to determine whether Negroes are present and available and to consider them for selection on his grand jury. His failure to do so is, in itself, a violation of the law. In following this method, Negroes would never have an opportunity to serve on his grand juries. And, since they have not served during his 33 years on the bench, the mathematical probability of having at least one Negro called to serve in those many years denounces any theory that chance and accident alone have kept Negroes from Judge Echezabal's grand juries. Therefore, it must be concluded that Negroes have been systematically and intentionally excluded from his grand juries.

On the other hand, if we accept what the State Supreme Court thinks Judge Echezabal did, then we at once realize that the court is not mindful of the Fourteenth Amendment of the Federal Constitution and the wealth of jurisprudence established by the United States Supreme Court in this field. If all a judge had to do to comply with the Fourteenth Amendment was to say that "the white persons

selected were better qualified than the colored," then there would be little necessity to retain the Fourteenth Amendment. In following this method, Negroes would never have an opportunity to serve on the grand jury. This is not to say that the judge selecting the jury would not be sincere in his efforts to obtain the twelve truly best qualified persons, but in Orleans Parish this mode of selection would *insure* systematic and intentional exclusion of Negroes due to the fact that while there are many qualified Negroes in New Orleans, 6 to 10 Negroes cannot generally compete with 65 to 69 whites if the judges who stage the contest continuously insist upon the best 12 out of 75.

Since the grand jurors are not chosen in Orleans Parish by lot but by deliberate selection wherein the presiding judge deliberately includes one man and just as deliberately excludes the other, then it necessarily follows that there has been systematic and purposeful exclusion of Negroes from grand juries in Orleans Parish all of these many years.

The State of Louisiana in answer to the serious constitutional question raised by the petitioner, expressed a belief, in its response to the petition for writ of certiorari, that it has complied with the law of *Reece* v. *Georgia*, 350 U.S. 85, 87, which states that for the motion to quash to be controverted it must be supported by evidence, citing *Patton* v. *Mississippi*, 332 U.S. 463, and *Martin* v. *Texas*, *supra*, 200 U.S. 316. The State takes comfort in its allegation that it has successfully rebutted petitioner's *prima facie* case. But, an analysis of that so-called rebuttal shows that the only proof offered was, as follows:

(1) that jury commissioners have placed names of qualified Negroes on every venire in recent years, and

(2) that Judge Echezabal said he has never discriminated against Negroes in the selection of his grand juries.

First of all, the petitioner is satisfied that the unconstitutional practice in the selection of Orleans Parish grand juries does not stem from the level of the jury commissioners.

Second, the *Reece* case, *supra*, 350 U.S. 85, 88, is authority for the proposition that:

> ". . . mere assertions of public officials that there has not been discrimination will not suffice . . ."

To the same effect is the recent case of *Hernandez* v. *Texas*, 347 U.S. 475, 481, which declared that the testimony of the jury commissioners that they had not discriminated, but had selected the best qualified persons in their opinions could not rebut the strong *prima facie* case of the denial of the equal protection of the laws guaranteed by the Constitution.

The State of Louisiana through its counsel has said in its response to the petition for writ of certiorari that if the testimony of the jury commissioners and the judge is not effective rebuttal, then the *prima facie* case is irrebuttable. This is not the case. Effective rebuttal would have been a showing that since the many decisions of the United States Supreme Court which have settled this question of constitutional law, the State of Louisiana had mended its ways and had changed its method of grand jury selection in Orleans Parish. Yet, the method that existed 30 years ago, existed as of the time of Judge Echezabal's grand jury and Judge Echezabal admitted that he followed the same practice in selecting the grand jury that indicted petitioner as he did when he ascended the bench 33 years ago.

It is unrealistic to say that the Judge as a distinguished jurist is above discriminatory practices that are ordinarily

attributed to jury commissioners. Nor do we believe that to prove petitioner's case Judge Echezabal would have to be regarded as a perjurer, both of which expressions have been made by respondent in its response to the petition for writ of certiorari. That Judge Echezabal is a distinguished jurist, scholar and gentleman is without refutation. But his method of grand jury selection has had the effect of violating the 14th Amendment and in this respect the Honorable Judge must heed the mandate of the United States Supreme Court which has set the predicate for this case. As this court said in a concurring opinion in *Cassell* v. *Texas, supra*, 339 U.S. 282, 293:

> ". . . prohibited conduct may result from misconception of what duty requires . . ."

And in *Hernandez* v. *Texas, supra*, 347 U.S. 475, 481, the court quoting from *Norris* v. *Alabama, supra*, 294 U.S. 587, 598, stated:

> ". . . If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of Negroes from jury service, the constitutional provision . . . would be but a vain and illusory requirement."

While the landmark cases of *Smith* v. *Texas*, 311 U.S. 128, 130, and *Patton* v. *Mississippi*, 332 U.S. 463, 469, need only be cited to substantiate the brief of petitioner, in a case of such great significance bearing upon the question of racial discrimination, counsel cannot resist including herein certain passages from each opinion. The case of *Smith* v. *Texas* is perhaps the strongest authority for reversing the instant case on the question of discrimination against Negroes on grand juries. The outstanding fact proved in the *Smith* case was that between the years 1931-

1938, five Negroes actually served on grand juries in Harris County, Texas; yet, the United States Supreme Court held that that was only token representation which was still tantamount to racial discrimination. Speaking through Mr. Justice Black, the Court (at p. 130) held:

> "Here, the Texas statutory scheme is not in itself unfair; it is capable of being carried out with no racial discrimination whatsoever. *But by reason of the wide discretion permissible in the various steps of the plan, it is equally capable of being applied in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable . . .*" (Emphasis ours.)

The Court (at p. 131) further stated:

> ". . . Chance and accident alone could hardly have brought about the listing for grand jury service of so few Negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service . . ."

And, in concluding his opinion (at p. 132), Mr. Justice Black said:

> ". . . Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintance, *discrimination can arise from commissioners who know no Negroes as well as from commissioners who know but eliminate them.* If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand." (Emphasis ours.)

Note the strong parallel between the situation that existed in the *Smith* case and that which has prevailed in

Judge Echezabal's court, where his grand jurors for 33 years have been drawn from the names of those outstanding citizens whom he knew personally or whom he recognized by their reputation in the community.

Whether the discrimination in Orleans Parish has been accomplished ingeniously or ingenuously is not an established fact. It is an established fact, however, that there could not be a jury system devised that could have caused a more complete exclusion of Negroes from grand jury service. In Orleans Parish, exclusion of the Negro has been total. It has not mattered in Orleans Parish which section of the court selected the grand jury, or which method was employed by the respective judge, or when the selection was made, or whether there was a token number of Negroes in the wheel, or whether there had been a campaign to place large numbers of Negroes in the wheel, or who the district attorney was at the time. For, no matter what conditions prevailed at any given time, exclusion of Negroes remained complete, constant, consistent and continuous over the years. . . .

Certainly chance and accident alone could hardly have brought about this gross inequity, and whatever system has been employed, the conclusion is inevitable that there has been racial discrimination, when, in the memory of living men there has not been a single known Negro drawn for grand jury service in the history of Orleans Parish.

As was said in the case of *Patton* v. *Mississippi*, *supra*, 332 U.S. 463, 469:

> "We hold that the State wholly failed to meet the very strong evidence of purposeful racial discrimination made out by the petitioner upon the uncontradicted showing that for thirty years or more no Negro had served as a juror in the criminal courts of Lauderdale County. When a jury selection plan, whatever it is,

operates in such a way as always to result in the complete and long-continued exclusion of any representative at all from a large group of Negroes, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand."

Another Louisiana case of great significance is the case of *Louisiana* v. *Anderson*, *supra*, 205 La. 710, 729; 18 So.2d 33, 40, which recognized the proposition that while the language of the state statute prescribing the method of grand jury selection may be valid and constitutional and not subject to attack by a person claiming racial discrimination, that the practical administration of that statute by public officials may deny the accused the equal protection of the laws in violation of the Fourteenth Amendment of the Federal Constitution.

It must be stated here that the attack on the grand jury which indicted petitioner is not on the basis of the lack of qualification of any one of the fine gentlemen who served conscientiously thereon during the six-month term. But, where a state method of selection of grand jurors is in conflict with the United States Constitution and the decisions of the United States Supreme Court, in which the Court has interpreted the applicable constitutional provision, established a criterion in such cases, and issued a mandate to the state courts, the said system of selection must be condemned as depriving the individual of his constitutional rights. As was said by Mr. Chief Justice Stone in *Hill* v. *Texas*, 316 U.S. 400, 406:

". . . Equal protection of the laws is something more than an abstract right. It is a command which the State must respect, the benefits of which every person may demand. Not the least merit of our constitutional system is that its safeguards extend to all—the least deserving as well as the most virtuous."

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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